IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTERS ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY;

Petitioners,

v.

THE HONORABLE HUGH STUART, JUDGE, District Court of Lincoln County, Nebraska,

Respondent.

AMENDED PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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No. 75-817

Nebraska Press Association; Omaha World-Herald Company; the Journal-Star Printing Co.; Western Publishing Co.; North Platte Broadcasting Co.; Nebraska Broadcasters Association; Associated Press; United Press International; Nebraska Professional Chapter of the Society of Professional Journalists/Sigma Delta Chi; Kiley Armstrong; Edward C. Nicholls; James Huttenmaier; William Eddy;

Petitioners,

v.

The Honorable Hugh Stuart, Judge, District Court of Lincoln County, Nebraska,

Respondent.

AMENDED PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

This Court, by Order in No. A-513, granted on December 8, 1975 petitioners' motion praying that the previously filed papers in No. A-426 and A-513 be treated as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska. On December 12, 1975, the Petition for a Writ of Certiorari was granted and this Court in its Order of December 12 invited petitioners to file an Amended Petition for a Writ of Certiorari. This Amended Petition is filed pursuant thereto.

Opinions Below

The opinions of the County Court of Lincoln County, Nebraska, dated October 22, 1975, and the District Court of Lincoln County, Nebraska, dated October 27, 1975, are set forth in the Appendix at p. 1a and 9a. The *per curiam* statement of the Nebraska Supreme Court issued on November 10, 1975 is set forth in the Appendix at p. 19a. The opinion of Mr. Justice Blackmun, dated November 13, 1975 is set forth in the Appendix at p. 21a. The Order of the Nebraska Supreme Court for Hearing and Order to Show Cause entered on November 18, 1975 is set forth in the Appendix at p. 29a. The opinion of Mr. Justice Blackmun dated November 20, 1975 is set forth in the Appendix at p. 35a. The majority and dissenting opinions of the Nebraska Supreme Court dated December 1, 1975 are set forth in the Appendix at p. 44a and are reported at 63 Neb. S.C.J. 783, —— N.W.2d ——. The Orders of this Court, dated December 8, 1975 and December 12, 1975, *inter alia*, granting the motion of petitioners to treat papers previously filed by them with this Court as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska and granting said Petition are set forth in the Appendix at p. 70a and p. 71a. Except as indicated above, none of said opinions is thus far reported.

Jurisdiction

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Questions Presented

1. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, an injunction may issue prohibiting publication by the press of information revealed in public court proceedings, in public court records, and from other sources about pending judicial proceedings.

2. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, a direct prior restraint may be imposed upon the publication by the press of information which does not relate to national security and which could not surely result in direct, immediate and irreparable injury to the nation or its people.

3. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, the injunction of the Nebraska Supreme Court dated December 1, 1975 prohibiting publication by the petitioners can be sustained as a matter of fact and law on this record.

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed

of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioners in this case are Nebraska newspaper publishers, broadcasters, journalists and media associations, and national newswire services that report from and to Nebraska. Petitioners are engaged primarily in the business of gathering, reporting, publishing and broadcasting local, national and international news, as well as other matters of interest, to their readers, listeners and to the general public. Petitioners have been ordered in a series of decisions of the County Court in and for Lincoln County, Nebraska, the District Court in and for Lincoln County, Nebraska, the Respondent, Judge Hugh Stuart presiding, and the Supreme Court of the State of Nebraska to refrain from publishing a broad spectrum of information, much of which was and is a matter of public record, relating to a case now awaiting trial in Nebraska entitled *State* v. *Simants*. The factual background leading up to these orders is, in brief, as follows:

On or about October 18, 1975, six members of the Kellie family were allegedly murdered in their home at Sutherland, Nebraska, and one or more of the alleged murders were purportedly in connection with the perpetration of or attempt to perpetrate one or more sexual assaults.

On October 19, 1975, defendant Erwin Charles Simants was arrested by the Lincoln County Sheriff and later charged with six counts of murder in the first degree in the perpetration or attempted perpetration of one or more sexual assaults, all of which is set forth in the complaint and amended complaint filed in the County Court of Lincoln County, Nebraska. At the arraignment hearing held before the County Court, several journalists were in attendance. Although a portion of the hearing was conducted openly, a part of the hearing was closed by the court to the press and the public.

The preliminary hearing was scheduled in the County Court of Lincoln County, Nebraska, at 9:00 A.M. on October 22 for a determination as to whether Simants should be bound over to the District Court of Lincoln County, Nebraska, on the charges set forth in the amended complaint. On October 21, the prosecution filed a motion with the County Court requesting that a restrictive order be entered by that court. This motion alleged "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is reported to the public." The defense joined in the prosecution's request and also moved that the preliminary hearing be closed to the public and the press. The latter request was denied by the County Court and an open preliminary hearing was held on October 22, at which time testimony was taken from various witnesses which disclosed significant factual information concerning the alleged crimes.

However, on that day, the County Court entered an Order which found that there was "a reasonable likelihood of prejudicial publicity which would make difficult, if not impossible, the impaneling of an impartial jury in the event the defendant is bound over to the District Court for trial. . . ." (App. p. 1a).* Without holding an evidentiary hearing, the County Court imposed broad restrictions on all attorneys, parties, witnesses, court personnel and all other persons "present in court" during the preliminary hearing prohibiting them from "releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." (App. p. 2a). The County Court also ordered that "no news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation." ** (App. p. 2a).

On October 23, petitioners forthwith filed an application with the District Court of Lincoln County, Nebraska, for leave to intervene in the case and for vacation of the County Court's order. Counsel for the defendant moved for con-

* References to "App. p.—" are to the appropriate pages of the Appendix to this Amended Petition.

** Excepted from the scope of the County Court's order were: (1) factual statements of the accused's name, age, residence, occupation, and family status; (2) the circumstances of the arrest (time and place, identity of the arresting and investigation officers and agencies, and the length of the investigation); (3) the nature, substance and text of the charge; (4) quotations from, or any reference without comment to, public records or communications heretofore disseminated to the public; (5) the scheduling and result of any stage of the judicial proceeding held in open court; (6) a request for assistance in obtaining evidence; and (7) a request for assistance in obtaining the names of possible witnesses. The Court also ordered that a copy of the preliminary hearing proceedings was to be made available to the public at the expiration of the order. (App. pp. 2a-3a).

tinuation of the County Court's Order and that all future pretrial proceedings in the *Simants* case be closed. On the same day, the District Court granted petitioners' motion to intervene, denied defense counsel's motion to close any future pretrial District Court proceedings, and adopted as its own on an interim basis the County Court's restrictive order. On October 27, the District Court terminated the County Court's order and substituted its own. The District Court found "because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." (App. p. 9a). The District Court adopted the aforementioned Nebraska Bar-Press Guidelines as "clarified" by the court in its order. The District Court ordered as follows:

> 1. It is hereby stated the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing, is "pre-trial" publicity.
>
> 2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.
>
> 3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.
>
> 4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at careful discretion of the press. The testimony

of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported.

6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported." * (App. pp. 10a-11a).

On October 31, petitioners sought relief from the District Court's order after having duly abided by the various orders of both the County and District Courts for nine days. Petitioners sought a stay from the District Court of its order and on the same day sought from the Supreme Court of Nebraska immediate relief, by way of mandamus, stay, and/or expedited appeal, from the District Court's order. Upon the failure of both the District Court and the Supreme Court of Nebraska to act on the requested relief, the petitioners filed an application on November 5 with this Court (directed to Mr. Justice Blackmun, as Circuit Justice) which sought a stay of the District Court's order. Apparently in response to the November 5 application by the petitioners and in order to avoid exercising

* That part of the District Court's order relating to the physical presence of the press at trial has not been contested by petitioners and is not now contested.

parallel jurisdiction with this Court, the Supreme Court of Nebraska issued a *per curiam* statement on November 10 in which that court declined to take any action on the petitioners' writ of mandamus action pending before it until such time as this Court made known whether it would accept jurisdiction in the matter. (App. p. 19a).

On November 13, Mr. Justice Blackmun, acting in his capacity as Circuit Justice, issued a chambers opinion in which he declined to act finally on the petitioner's application for stay of the District Court's order "[o]n the expectation, which I think is now clear and appropriate for me to have, that the Supreme Court of Nebraska, forthwith and without delay, will entertain the petitioners' application made to it, and will promptly decide it in the full consciousness that time is of the essence." (App. p. 28a). In so ruling, on November 13, Mr. Justice Blackmun noted that "if no action on the petitioners' application to the Supreme Court of Nebraska could be anticipated before December 1 . . . a definitive decision by the state's highest court on an issue of profound constitutional implication, demanding immediate resolution, would be delayed for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the petitioners possess and may properly assert. Under these circumstances, I would not hesitate promptly to act." (App. p. 27a). Mr. Justice Blackmun reserved the right to petitioners "to reapply to me should prompt action not be forthcoming." (App. p. 28a).

On November 18, the Nebraska Supreme Court set November 25 as the date on which it would hear petitioners' arguments on their request for mandamus and on the substantive questions surrounding the validity under the Constitution of the District Court's order. (App. p. 29a). The petitioners, pursuant to the November 13 ruling of Mr. Justice Blackmun, on November 18 renewed their application for a stay.

On November 20 Mr. Justice Blackmun granted petitioners a partial stay of the District Court's order after concluding that the Supreme Court of Nebraska's delay in rendering a definitive decision had exceeded "tolerable limits". (App. pp. 35a, 36a). As Mr. Justice Blackmun observed in his chambers opinion:

> "[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable. By deferring action until November 25, and possibly later, the Supreme Court of Nebraska has decided, and, so far as the intervening days are concerned, has finally decided, that this restraint on the media will persist. In this sense, delay itself is a final decision." (App. p. 37a).

In granting a partial stay, Mr. Justice Blackmun made, *inter alia*, the following rulings:

(1) That portion of the District Court's order which generally incorporates the aforementioned Nebraska Bar-Press Guidelines was stayed by reason of the fact that the Guidelines

> "are merely suggestive and, accordingly, are necessarily vague. . . . I find them on the whole . . . sufficiently riddled with vague and indefinite admonitions—understandably so in view of the basic nature of "guidelines"—that I have concluded that the best and momentary course is to stay their mandatory and wholesale imposition in the present context. The state courts, nonetheless, are free forthwith to reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately

> specific and in keeping with the remainder of this order." (App. pp. 38a-39a).

(2) Paragraphs 4 and 5 of the District Court's order was stayed by Mr. Justice Blackmun since:

> "No persuasive justification has been advanced for those parts of the restrictive order that prohibit the reporting of the details of the crimes, of the identities of the victims, or of the testimony of the pathologist at the preliminary hearing that was open to the public. . . . These facts in themselves do not implicate a particular putative defendant. . . . But until the bare facts concerning the crimes are related to a particular accused, it does not seem to me that their being reported in the media irreparably infringes the accused's right to a fair trial of the issue as to whether he was the one who committed the crimes. There is no necessary implication of the person, who has been named as the accused, in the facts suppressed by paragraphs 4 and 5 of the District Court's restrictive order. . . ." (App. pp. 39a-40a).

(3) The District Court's order's restraints on other aspects of pretrial publicity were not prohibited by Mr. Justice Blackmun, "at least on an application for a stay and at this distance. . . ." (App. p. 40a). Observing that "[r]estrictions limited to pretrial publicity may delay media coverage" but that "at-least they do no more than that," Mr. Justice Blackmun concluded that "certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial. A confession or statement against interest is the paradigm." (App. p. 40a). Other facts which are possibly implicative of the accused—*e.g.*, "those associated with the circumstances of his arrest", "facts associated with the accused's criminal record, if he has one"; "[c]ertain statements as to the accused's guilt

by those associated with the prosecution"—were held to be potentially proper subjects for restraint prior to the trial if the burden of proof set forth by Mr. Justice Blackmun ("publicizing particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt") was satisfied. (App. p. 41a).

Mr. Justice Blackmun concluded his November 20 order by noting that the Supreme Court of Nebraska "may well conclude that other portions of that order are also to be stayed or vacated." (App. p. 42a).

On November 21, petitioners filed a motion with all Justices of this Court to vacate so much of Mr. Justice Blackmun's order dated November 20 as had not stayed the imposition upon the press of the prior restraint on publication.

On November 25 the Supreme Court of Nebraska heard oral argument upon the petitioners' request for a stay of the District Court's order. On December 1 the Nebraska Supreme Court issued a *per curiam* opinion (two judges dissenting on jurisdictional grounds and two others joining the remaining three solely to break what would otherwise have been a procedural deadlock). (App. p. 44a). The Court held as follows:

> "We conclude that the order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.
>
> "The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the following respects: It shall be effective only as to events which have occurred prior to the release of this opinion, and only as it applies to the relators herein, and

> only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interests made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings." (App. pp. 63a-64a).

The Supreme Court of Nebraska also remanded the defendant's request for all future pretrial proceedings to be closed to the District Court with instructions to consider all such applications in the future in accord with A.B.A. Standard 3.1, Fair Trial and Free Press: Pretrial Hearings, which the Court incorporated and adopted in its opinion. (App. pp. 64a-65a).

On December 4 petitioners applied to this Court for a stay of the order of the Supreme Court of Nebraska and further moved this Court to treat the previously filed papers as a Petition for a Writ of Certiorari. On December 8 this Court denied without prejudice the petitioners' motion dated November 21 which sought to vacate in part Mr. Justice Blackmun's stay order dated November 20 insofar as that order expired on December 1, the date of the Supreme Court of Nebraska's order. This Court granted petitioners' motion to treat the previously filed papers as a Petition for a Writ of Certiorari, consideration of which was deferred until additional papers were received by this Court or until the close of business on December 9; consideration was also deferred of the application for a stay of the order of the Supreme Court of Nebraska. (Justices Brennan, Stewart and Marshall would have granted the latter application.) (App. p. 70a).

On December 12, 1975, this Court granted the Petition for a Writ of Certiorari; denied the motion to expedite (Justices Brennan, Stewart and Marshall dissenting); denied the application for a stay (Justices Brennan, Stewart and Marshall dissenting in whole; Justice White dissenting with respect to the publication of information disclosed in public at the preliminary hearing in the *Simants* case); and invited the submission of this Amended Petition for Certiorari. (App. p. 71a).

Reasons for Granting the Writ

This is the third case to reach this Court within two years involving the constitutionality of prior restraints imposed on the press with respect to its reporting about judicial proceedings. In this case, as in *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301 (1974), and *Newspapers, Inc.* v. *Blackwell*, 421 U.S. 997 (1975), the case came before the Court on a motion for a stay, thus presenting the Court with what Mr. Justice Blackmun has referred to as "an issue of profound constitutional implications, demanding immediate resolution. . . ." (App. p. 27a).

While the order now under review would appear to expire at the beginning of the underlying criminal trial, which is now scheduled to commence on January 5, 1976, there is little doubt that unless a decision is reached in this case with respect to the constitutionality of such prior restraints imposed upon publication, the Court will be confronted with a plethora of such cases—invariably arising in the context of hastily briefed motions for a stay which, by their terms, expire quickly enough to raise serious questions of mootness. This is thus a classic example of that exception to the mootness doctrine of "short term orders, capable of repetition, yet evading review . . ." adverted to by the Court in *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), and its progeny. *See Super Tire Engi-*

neering Co. v. *McCorkle*, 416 U.S. 115, 125-26 (1974); *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974).

That such a case should arise in the context of a prior restraint on publication makes it all the more urgent that it be heard and decided by the Court. It was once axiomatic to observe, as did Mr. Justice Holmes, that the "main purpose" of the First Amendment was to "'prevent all such prior restraints upon publications as had been practiced by other governments. . . .'" *Patterson* v. *Colorado*, 205 U.S. 456, 462 (1907). Such language was repeated by the Court in *Near* v. *Minnesota*, 283 U.S. 697, 702 (1931), and the extremely narrow exceptions on prior restraints on publication set forth in the national security area in *Near* (*e.g.*, ". . . publication of the sailing dates of transports or the number or location of troops . . .") and *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), have thus far been the only ones ever receiving the approval of a majority of the Court. As phrased in Mr. Justice Stewart's concurring opinion (joined by Mr. Justice White) in the *New York Times* case, publication could not be enjoined unless it would "surely result in direct, immediate and irreparable damage to our Nation or its people." (403 U.S. at 730.)

There is particular need to avoid the imposition of prior restraints with respect to reporting regarding pending judicial proceedings. This Court has previously noted that it has been, in the area of such reporting, "unwilling to place *any* direct limitations on the freedom traditionally exercised by the news media," *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966) (emphasis added).* *See also, Younger* v.

* Indeed, the *Sheppard* case set forth in detail a variety of methods available to trial judges which could protect fully a defendant's right to a fair trial under the Sixth Amendment without the imposition of any direct restraints on the media. One of the methods *not* suggested in *Sheppard* is the blanket closing of courts during preliminary hearings—a method now recommended to the

Smith, 30 Cal.App.3d 138, 106 Cal. Rptr. 225 (1973); *Oliver* v. *Postel*, 30 N.Y.2d 171, 331 N.Y.S.2d 407, 412-13 (1972); *State* v. *Sperry*, 79 Wash.2d 69, 483 P.2d 608, *cert. denied*, *McCrea* v. *Sperry*, 404 U.S. 939 (1971); *State* v. *Rose*, 271 So.2d 483 (D.Ct. App.Fla.2d Dist. 1972). The instant decision of the Supreme Court of Nebraska is inconsistent with all those rulings. It is also inconsistent with four separate bar association reports issued subsequent to *Sheppard*, none of which sanctioned from either a constitutional or policy stance the imposition of any prior restraints on the press in its coverage of the courts.*

Indeed, so pervasive is the sweep of the Nebraska ruling that it effectively bars publication of much information that was either publicly testified to in open court or is contained in documents publicly filed with those courts. As such, the ban is contrary to the rulings of this Court in such cases as *Craig* v. *Harney*, 331 U.S. 367, 374 (1947); *Estes* v. *Texas*, 381 U.S. 532, 541-42 (1965) and the more recent *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975) decision.

Finally, there is simply no factual basis for the ban placed on the Nebraska press. The "evidence" produced

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Nebraska lower courts by the decision of the Supreme Court of Nebraska. In this respect as well as those stated above, petitioners believe the Nebraska ruling contravenes well-established constitutional principles. To this date, no such order has been entered. *See, e.g., In Re Oliver*, 333 U.S. 257 (1948); *Phoenix Newspapers Inc.* v. *Jennings*, 107 Ariz. 557, 490 P.2d 563 (1971).

* Report of the Committee on the Operation of the Jury System, *The "Free Press-Fair Trial" Issue*, 45 F.R.D. 391, 401-02 (1968); Report of the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York, *Freedom of the Press and Fair Trial* 10-11 (1967); ABA Advisory Committee on Fair Trial and Free Press, *Standards Relating to Fair Trial and Free Press* 13-14 (Approved Draft, March 1968); ABA Legal Advisory Committee on Fair Trial and Free Press, *Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press* (1975).

to justify the prior restraint could not withstand any constitutional test. The prior restraint is not even made applicable to the entire media but instead binds petitioners alone. For these and other reasons related to the record, the Nebraska Supreme Court order could not in any event be sustained.

CONCLUSION

For the reasons set forth above, the action of this Court on December 12, 1975 in granting the Petition for a Writ of Certiorari was proper. This Amended Petition is filed in response to the invitation of this Court of that date.

Respectfully submitted,

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December 24, 1975

APPENDIX

Order of the Court

[October 22, 1975]

IN THE

COUNTY COURT
OF LINCOLN COUNTY, NEBRASKA

STATE OF NEBRASKA,

Plaintiff,

VS.

ERWIN CHARLES SIMANTS,

Defendant.

Under our constitution due process requires that the accused receive a trial by impartial jury free from outside influences. The power and the persuasiveness of the news media are of such significance that Courts must at times take strong actions to insure that both parties in a criminal law suit start equally. Prosecution in this case has made a motion for a protective order with respect to pretrial publicity. The defense has joined in that motion.

In order to guarantee the constitutional rights of the defendant and at the same time to protect the interests of the State of Nebraska, the Court would therefore find that:

> there is a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury in the event that the defendant is bound over to the District Court for trial in the matter now pending before this Court.

Order of the Court

IT IS THEREFORE THE ORDER OF THIS COURT that no parties to this action, nor any attorney connected with this case as defense counsel or prosecution, nor any other attorney, nor any judicial officer or employee, nor any public official, nor any sheriff, nor any agent, deputy or employee of any such persons, nor any witnesses having appeared at the preliminary hearing in this matter, nor any person subpoenaed to testify at the trial of this matter, nor any other person present in Court, shall release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing.

IT IS FURTHER ORDERED that no party to this case, law enforcement official, public officer, attorney, witnesses or news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation, a copy of which is attached hereto and made a part hereof.

This Order does not include the following:

1. Factual statements of the accused person's name, age, residence, occupation, and family status.

2. The circumstances of the arrest, namely, the time and place of the arrest, the identity of the arresting and investigating officers and agencies, and the length of the investigation.

3. The nature, substance, and text of the charge, including a brief description of the offenses charged.

Order of the Court

4. Quotations from, or any reference without comment to, public records of the Court in the case, or to other public records or communications heretofore disseminated to the public.

5. The scheduling and result of any stage of the judicial proceeding held in open court in an open or public session.

6. A request for assistance in obtaining evidence.

7. A request for assistance in the obtaining of evidence or the names of possible witnesses.

The court being mindful of the public's right to know and the guaranties of the Constitution of the United States and the State of Nebraska to a free press, the court does therefore order that a copy of the preliminary hearing proceedings be made available to the public at the expiration of this order.

In accordance with this order, the court hereby grants the County Attorney's and Defendant's motion for a restrictive order and denies that portion of the defendant's motion requesting a closed hearing. This order to remain in effect until modified or rescinded by a higher court or until the defendant is ordered released from these charges.

BY THE COURT:

/s/ RONALD A. RUFF
Ronald A. Ruff
County Judge

October 22, 1975

(Seal)

NEBRASKA BAR-PRESS GUIDELINES FOR DISCLOSURE AND REPORTING OF INFORMATION RELATING TO IMMINENT OR PENDING CRIMINAL LITIGATION

These voluntary guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. They are not intended to prevent the news media from inquiring into and reporting on the integrity, fairness, efficiency and effectiveness of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process.

As a voluntary code, these guidelines do not necessarily reflect in all respects what the members of the bar or the news media believe would be permitted or required by law.

Information Generally Appropriate for Disclosure, Reporting

Generally, it is appropriate to disclose and report the following information:

1. The arrested person's name, age, residence, employment, marital status and similar biographical information.

2. The charge, its text, any amendments thereto, and, if applicable, the identity of the complainant.

3. The amount or conditions of bail.

4. The identity of and biographical information concerning the complaining party and victim, and, if a death

is involved, the apparent cause of death unless it appears that the cause of death may be a contested issue.

5. The identity of the investigating and arresting agencies and the length of the investigation.

6. The circumstances of arrest, including time, place, resistance, pursuit, possession of and all weapons used, and a description of the items seized at the time of arrest. It is appropriate to disclose and report at the time of seizure the description of physical evidence subsequently seized other than a confession, admission or statement. It is appropriate to disclose and report the subsequent finding of weapons, bodies, contraband, stolen property and similar physical items if, in view of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial.

7. Information disclosed by the public records, including all testimony and other evidence adduced at the trial.

Information Generally Not Appropriate for Disclosure, Reporting

Generally, it is not appropriate to disclose or report the following information because of the risk of prejudice to the right of an accused to a fair trial:

1. The existence or contents of any confession, admission or statement given by the accused, except it may be stated that the accused denies the charges made against him. This paragraph is not intended to apply to statements made by the accused to representatives of the news media or to the public.

2. Opinions concerning the guilt, the innocence or the character of the accused.

3. Statements predicting or influencing the outcome of the trial.

4. Results of any examination or tests or the accused's refusal or failure to submit to an examination or test.

5. Statements or opinions concerning the credibility or anticipated testimony of prospective witnesses.

6. Statements made in the judicial proceedings outside the presence of the jury relating to confessions or other matters which, if reported, would likely interfere with a fair trial.

Prior Criminal Records

Lawyers and law enforcement personnel should not volunteer the prior criminal records of an accused except to aid in his apprehension or to warn the public of any dangers he presents. The news media can obtain prior criminal records from the public records of the courts, police agencies and other governmental agencies and from their own files. The news media acknowledge, however, that publication or broadcast of an individual's criminal record can be prejudicial, and its publication or broadcast should be considered very carefully, particularly after the filing of formal charges and as the time of the trial approaches, and such publication or broadcast should generally be avoided because readers, viewers and listeners are potential jurors and an accused is presumed innocent until proven guilty.

Photographs

1. Generally, it is not appropriate for law enforcement personnel to deliberately pose a person in custody for photographing or televising by representatives of the news media.

2. Unposed photographing and televising of an accused outside the courtroom is generally appropriate, and law enforcement personnel should not interfere with such photographing or televising except in compliance with an order of the court or unless such photographing or televising would interfere with their official duties.

3. It is appropriate for law enforcement personnel to release to representatives of the news media photographs of a suspect or an accused. Before publication of any such photographs, the news media should eliminate any portions of the photographs that would indicate a prior criminal offense or police record.

Continuing Committee for Cooperation

The members of the bar and the news media recognize the desirability of continued joint efforts in attempting to resolve any areas of differences that may arise in their mutual objective of assuring to all Americans both the correlative constitutional rights to freedom of speech and press and to a fair trial. The bar and the news media, through their respective associations, have determined to establish a permanent committee to revise these guidelines whenever this appears necessary or appropriate, to issue opinions as to their application to specific situations, to receive, evaluate and make recommendations with re-

spect to complaints and to seek to effect through educational and other voluntary means a proper accommodation of the constitutional correlative rights of free speech, free press and fair trial.

June, 1970

Order of the Court

[October 27, 1975]

Case No. B-2904

IN THE

DISTRICT COURT
IN AND FOR LINCOLN COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

ERWIN CHARLES SIMANTS,

Defendant.

Now on this 27th day of October, 1975, the same being one of the regular days of the September, 1975 term of the District Court in and for Lincoln County, Nebraska, the above entitled case comes on for determination of the defendant's motion for a continuation of the Lincoln County Court's order with respect to pre-trial publicity.

THE COURT, BEING DULY INFORMED, FINDS because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial and that an order setting forth the limitations of pre-trial publicity is appropriate, and an order for the news media and public's accommodation to physical facilities is appropriate.

IT IS THEREFORE ORDERED that the Order of the Lincoln County Court which was adopted by this Court October 23, 1975 is hereby terminated.

Order of the Court

THE COURT FURTHER ORDERS that pre-trial publicity shall be in accordance with the following order:

The standards set forth in The Nebraska Bar-Press Guidelines for Disclosing and Reporting of Information Relating to Imminent or Pending Criminal Litigation are approved and are hereby adopted as the Court Order for dissemination of information in this case: that a copy of such guidelines is attached hereto and by this reference made a part hereof. Such guidelines should be clarified as follows:

1. It is hereby stated the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing is "pre-trial" publicity.

2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.

3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.

4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at the careful discretion of the press. The testimony of

Order of the Court

this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported.

6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported.

In keeping with the physical facilities of the Lincoln County Courthouse, the Court orders the following:

1. No photographs will be taken on the third or fourth floors of the Lincoln County Courthouse at any time during the conduct of this case.

2. The main hall on the third floor of the Lincoln County Courthouse will be cleared of all personnel while the jury is moving in or out of the courtroom. When the jury is excused during the conduct of the case, all counsel, news media personnel, spectators, or other persons present in the courtroom will remain seated until the jury has left the courtroom and cleared the main third floor hallway.

Order of the Court

This order will remain in effect until further order of the court or until completion of this case.

BY THE COURT:

/s/ HUGH STUART
HUGH STUART
District Judge

Order of the Court

NEBRASKA BAR-PRESS GUIDELINES FOR DISCLOSURE AND REPORTING OF INFORMATION RELATING TO IMMINENT OR PENDING CRIMINAL LITIGATION

These voluntary guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. They are not intended to prevent the news media from inquiring into and reporting on the integrity, fairness, efficiency and effectiveness of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process.

As a voluntary code, these guidelines do not necessarily reflect in all respects what the members of the bar or the news media believe would be permitted or required by law.

Information Generally Appropriate for Disclosure, Reporting

Generally, it is appropriate to disclose and report the following information:

1. The arrested person's name, age, residence, employment, marital status and similar biographical information.

2. The charge, its text, any amendments thereto, and, if applicable, the identity of the complainant.

3. The amount or conditions of bail.

4. The identity of and biographical information concerning the complaining party and victim, and, if a death

is involved, the apparent cause of death unless it appears that the cause of death may be a contested issue.

5. The identity of the investigating and arresting agencies and the length of the investigation.

6. The circumstances of arrest, including time, place, resistance, pursuit, possession of and all weapons used, and a description of the items seized at the time of arrest. It is appropriate to disclose and report at the time of seizure the description of physical evidence subsequently seized other than a confession, admission or statement. It is appropriate to disclose and report the subsequent finding of weapons, bodies, contraband, stolen property and similar physical items if, in view of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial.

7. Information disclosed by the public records, including all testimony and other evidence adduced at the trial.

Information Generally Not Appropriate for Disclosure, Reporting

Generally, it is not appropriate to disclose or report the following information because of the risk of prejudice to the right of an accused to a fair trial:

1. The existence or contents of any confession, admission or statement given by the accused, except it may be stated that the accused denies the charges made against him. This paragraph is not intended to apply to statements made by the accused to representatives of the news media or to the public.

2. Opinions concerning the guilt, the innocence or the character of the accused.

3. Statements predicting or influencing the outcome of the trial.

4. Results of any examination or tests or the accused's refusal or failure to submit to an examination or test.

5. Statements or opinions concerning the credibility or anticipated testimony of prospective witnesses.

6. Statements made in the judicial proceedings outside the presence of the jury relating to confessions or other matters which, if reported, would likely interfere with a fair trial.

Prior Criminal Records

Lawyers and law enforcement personnel should not volunteer the prior criminal records of an accused except to aid in his apprehension or to warn the public of any dangers he presents. The news media can obtain prior criminal records from the public records of the courts, police agencies and other governmental agencies and from their own files. The news media acknowledge, however, that publication or broadcast of an individual's criminal record can be prejudicial, and its publication or broadcast should be considered very carefully, particularly after the filing of formal charges and as the time of the trial approaches, and such publication or broadcast should generally be avoided because readers, viewers and listeners are potential jurors and an accused is presumed innocent until proven guilty.

Photographs

1. Generally, it is not appropriate for law enforcement personnel to deliberately pose a person in custody for photographing or televising by representatives of the news media.

2. Unposed photographing and televising of an accused outside the courtroom is generally appropriate, and law enforcement personnel should not interfere with such photographing or televising except in compliance with an order of the court or unless such photographing or televising would interfere with their official duties.

3. It is appropriate for law enforcement personnel to release to representatives of the news media photographs of a suspect or an accused. Before publication of any such photographs, the news media should eliminate any portions of the photographs that would indicate a prior criminal offense or police record.

Continuing Committee for Cooperation

The members of the bar and the news media recognize the desirability of continued joint efforts in attempting to resolve any areas of differences that may arise in their mutual objective of assuring to all Americans both the correlative constitutional rights to freedom of speech and press and to a fair trial. The bar and the news media, through their respective associations, have determined to establish a permanent committee to revise these guidelines whenever this appears necessary or appropriate, to issue opinions as to their application to specific situations, to receive, evaluate and make recommendations with re-

spect to complaints and to seek to effect through educational and other voluntary means a proper accommodation of the constitutional correlative rights of free speech, free press and fair trial.

June, 1970

Order of the Court

CERTIFICATE

STATE OF NEBRASKA,
COUNTY OF LINCOLN, ss.:

I, the undersigned, Clerk of the District Court of Lincoln County, Nebraska, do hereby certify that the above and foregoing is a full, true and correct copy of "Order" entered by the Court on the 27th day of October, 1975, in the above entitled matter, as the same appears of record in said Court.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court on this 3rd day of November, 1975.

/s/ VIRGINIA BURKE, DEPUTY
CLERK OF THE DISTRICT COURT

November 3, 1975

Attest and Certification Is True Copy
I. L. BOYLE
Clerk of the District Court
By V. BURKE, DEPUTY

Per Curiam Statement

[November 10, 1975]

STATE OF NEBRASKA, ex rel. NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY, et al.,

Relators,

v.

THE HONORABLE HUGH STUART, JUDGE, DISTRICT OF LINCOLN COUNTY, NEBRASKA,

Respondent.

PER CURIAM.

The relators have petitioned this court for leave to file their petition for a writ of mandamus or other appropriate relief, directing the respondent District Judge, the Honorable Hugh Stuart, of the District Court for Lincoln County, Nebraska, to forthwith vacate an order of the District Court for Lincoln County, dated October 27, 1975, relating to the publication of pretrial publicity in the case of State of Nebraska v. Erwin Charles Simants.

During our consideration of the application and the request for stay of the order, we are reliably informed that the relators have filed with the Supreme Court of the United States an application or a request that that court act to accomplish the same purposes to be accomplished by their request to us to exercise our original jurisdiction.

The existence of the two concurrent applications could put this court in the position of exercising parallel jurisdiction with the Supreme Court of the United States. We

deem this inadvisable. Accordingly, the matter is continued until the Supreme Court of the United States has made known whether or not it will accept jurisdiction in the matter.

On Application for Stay

[November 13, 1975]

SUPREME COURT
OF THE UNITED STATES

No. A-426

NEBRASKA PRESS ASSOCIATION et al.,
Applicants,

v.

HUGH STUART, Judge, District Court of Lincoln County, Nebraska.

MR. JUSTICE BLACKMUN, Circuit Justice.

This is an application for stay of an order of the District Court of Lincoln County, Neb., that restricts coverage by the media of details concerning alleged sexual assaults upon and murders of six members of a family in their home in Sutherland, Neb.; concerning the investigation and development of the case against the accused; and concerning the forthcoming trial of the accused. The applicants are Nebraska newspaper publishers, national newswire services, media associations, a radio station, and employees of these entities.

The accused is the subject of a complaint filed in the County Court of Lincoln County, Neb., on October 19, 1975. The complaint was amended on October 22 and, as so amended, charged the accused with having perpetrated the asaults and murders on October 18. On October 21, the prosecution filed with the County Court a motion for a re-

strictive order. This motion alleged "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is reported to the public." The defense joined in the prosecution's request, and also moved that the preliminary hearing be closed to the public and the press.

Refusing the latter request, the County Court held an open preliminary hearing on October 22. On that day it bound the accused over to the District Court. It, however, did issue a protective order. The Court found that there was "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury." The Court then ordered that no party to the action, no attorney connected with the defense or prosecution, no judicial officer or employee, and no witness or "any other person present in Court" was to "release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." It went on to order that no "news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation." Excepted, however, were (1) factual statements of the accused's name, age, residence, occupation, and family status; (2) the circumstances of the arrest (time and place, identity of the arresting and investigating officers and agencies, and the length of the investigation); (3) the nature, substance and text of the charge; (4) quotations from, or any

reference without comment to, public records or communications heretofore disseminated to the public; (5) the scheduling and result of any stage of the judicial proceeding held in open court; (6) a request for assistance in obtaining evidence; and (7) a request for assistance in obtaining the names of possible witnesses. The Court also ordered that a copy of the preliminary hearing proceedings was to be made available to the public at the expiration of the order.

A copy of the Bar-Press Guidelines was attached to the court's order and was incorporated in it by reference. In their preamble the Guidelines are described as a "voluntary code." They speak of what is "generally" appropriate or inappropriate for the press to disclose or report. The identity of the defendant, and also the victim, may be reported, along with biographical information about them. The circumstances of the arrest may be disclosed, as may the evidence against the defendant, "if, in view of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial." Confessions or other statements of the accused may not be disclosed, unless they have been made "to representatives of the press or to the public." Also barred from disclosure are opinions as to the guilt of the accused, predictions of the outcome of trial, results of examinations and tests, statements concerning the anticipated testimony of witnesses, and statements made in court but out of the presence of the jury "which, if reported, would likely interfere with a fair trial." The media are instructed by the Guidelines that the reporting of an accused's prior criminal record "should be considered very carefully" and "should generally be avoided." Photographs are permis-

sible provided they do not "deliberately pose a person in custody."

The petitioners forthwith applied to the District Court of Lincoln County for vacation of the County Court's order. The defense, in turn, moved for continuation of the order and that all future proceedings in the case be closed. The respondent, as judge of the District Court, granted a motion by the petitioners to intervene in the case. On October 27 he terminated the County Court's order and substituted his own. By its order of that date the District Court found that "there is a clear and present danger that pretrial publicity could impinge upon the defendant's right to a fair trial." It ordered that the pretrial publicity in the case be in accord with the above-mentioned Guidelines as "clarified by the court." The clarification provisions were to the effect that the trial of the case commences when a jury is impaneled and that all reporting prior to that event was pretrial publicity; that it appeared that the defendant had made a statement or confession "and it is inappropriate to report the existence of such statement or the contents of it"; that it appeared that the defendant may have made statements against interest to three named persons and may have left a note "and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported"; that the testimony of the pathologist witness "dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported"; that "the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be

reported"; that the "exact nature of the limitations of publicity as entered by this order will not be reported," that is to say, "the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported."

The petitioners then sought from the District Court a stay of its order. Not receiving relief there, they applied to the Supreme Court of Nebraska for an immediate stay and also for leave to commence an original action in the nature of mandamus and/or prohibition to vacate the District Court order of October 27. On November 4, counsel for the petitioners was advised by the Clerk of the Supreme Court that under that court's rules "all motions must be noticed for a day certain when the court is regularly in session," and that the "next date for submission of such a matter will be Monday, December 1, 1975, and I suggest that your motion be noticed for that date."

On November 5, the petitioners, reciting that the "District Court and the Nebraska Supreme Court have declined to act on the requested relief," filed with this Court, directed to me as Circuit Justice, the present application for stay of the order of the District Court in and for Lincoln County, Neb. Because of the obvious importance of the issue and the need for immediate action, and because of the apparent similarity of the facts to those that confronted MR. JUSTICE POWELL as Circuit Justice, in the case of *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S. 1301 (1974), I asked for prompt responses. That request has been honored and responses respectively were received on November 10 and 11 from the Attorney General of Nebraska on behalf of the respondent judge, from the Lin-

coln County attorney on behalf of the State, and from counsel for the accused.

I was advised yesterday, however, that on November 10 the Supreme Court of Nebraska issued a *per curiam* statement reciting that the applicants have petitioned that court for leave to file their petition for a writ of mandamus or other appropriate relief with respect to the District Court order of October 27, and further reciting that during that court's "consideration of the application and the request for stay of the order, we are reliably informed that the relators have filed with the Supreme Court of the United States an application or a request that that court act to accomplish the same purposes to be accomplished by their request to us to exercise our original jurisdiction," and then providing:

> "The existence of the two concurrent applications could put this court in the position of exercising parallel jurisdiction with the Supreme Court of the United States. We deemed this inadvisable. Accordingly, the matter is continued until the Supreme Court of the United States has made known whether or not it will accept jurisdiction in the matter."

The issue raised is one that centers upon cherished First and Fourteenth Amendment values. Just as MR. JUSTICE POWELL observed in *Times-Picayune*, 419 U.S., at 1305, the case "presents a fundamental confrontation between the competing values of fair press and fair trial, with significant public and private interests balanced on both sides." The order in question obviously imposes significant prior restraints on media reporting. It therefore comes to me "bearing a heavy presumption against its constitutional validity." *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971). But we have also observed that the media may be prohibited from publishing information about trials if the restriction is "necessary to assure a defendant a fair trial before an impartial tribunal." *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972). See *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S., at 1307; *Newspapers, Inc.* v. *Blackwell*, 421 U.S. 997 (1975).

It is apparent, therefore, that if no action on the petitioners' application to the Supreme Court of Nebraska could be anticipated before December 1, as the above described communication from that court's clerk intimated, a definitive decision by the State's highest court on an issue of profound constitutional implications, demanding immediate resolution, would be delayed for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the petitioners possess and may properly assert. Under those circumstances, I would not hesitate promptly to act.

It appears to me, however, from the Nebraska court's *per curiam* statement that it was already considering the petitioners' application and request for stay that had been submitted to that tribunal. That court deferred decision, it says, because of the pendency of the similar application before me, and because it deemed inadvisable simultaneous consideration of the respective applications in Nebraska and here in Washington. Accordingly, the matter was "continued" until it was known whether I would act.

It is highly desirable, of course, that the issue, concerning, as it does, an order by a Nebraska state court, should be decided in the first instance by the Supreme Court of Nebraska, and that the pendency of the application before me should not be deemed to stultify that court

in the performance of its appropriate constitutional duty. The application, after all, was submitted to me on the assumption that action by the Nebraska court would not be forthcoming until after a submission to be scheduled no earlier than December 1 and on the further assumption that the District Court's order satisfied the requirements of 28 U. S. C. § 1257. On the expectation, which I think is now clear and appropriate for me to have, that the Supreme Court of Nebraska, forthwith and without delay, will entertain the petitioners' application made to it, and will promptly decide it in the full consciousness that "time is of the essence." I hereby give the Supreme Court of Nebraska that assurance it desired that, at least for the immediate present, I neither issue nor finally deny a stay on the papers before me. My inaction, of course, is without prejudice to the petitioners to reapply to me should prompt action not be forthcoming.

Order for Hearing and Order to Show Cause

[November 18, 1975]

No. 40471.

STATE OF NEBRASKA ex rel.
NEBRASKA PRESS ASSOCIATION, et al.,
Relators,

v.

THE HONORABLE HUGH STUART, JUDGE, DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA,
Respondent.

No. 40445.

STATE OF NEBRASKA,
Plaintiff,

v.

ERWIN CHARLES SIMANTS,
Defendant.

The relators did on the afternoon of Friday, October 31, 1975, petition this court for leave to file their petition for a writ of mandamus or other appropriate relief, asking us to direct the respondent District Judge, the Honorable Hugh Stuart, of the District Court for Lincoln County, Nebraska, to forthwith vacate an order of the District Court for Lincoln County, dated October 27, 1975, relating to the publication of pretrial publicity in the case of State of Nebraska v. Erwin Charles Simants.

On November 4, 1975, in the case of State of Nebraska v. Erwin Charles Simants in the District Court for Lincoln

County, Nebraska, the interveners therein, being the same persons as the relators in the application referred to in the preceding paragraph, filed notice of direct appeal from the order of the Honorable Hugh Stuart of October 27, 1975, and that appeal is now docketed in this court as No. 40445. Also on November 4, 1975, the interveners filed in No. 40445, a motion to advance the appeal in accordance with Rule 17, Revised Rules of the Supreme Court of the State of Nebraska, 1974, which motion also requests that order of October 27, 1975, be stayed pending a hearing on the merits.

On November 5, 1975, the relators and the interveners filed in the Supreme Court of the United States an application, directed to Mr. Justice Blackmun, as circuit justice, for stay of the order of October 27, 1975, of the Honorable Hugh Stuart.

The effect of the foregoing actions of the relators and interveners was that on November 5, 1975, they had simultaneously pending in this court two proceedings and in the Supreme Court of the United States one proceeding, each of which had the same ultimate objective, namely, vacation of the order of October 27, 1975.

On November 11, 1975, this court in the matter referred to in the first paragraph of this order entered an order in part as follows: "During our consideration of the application and the request for stay of the order, we are reliably informed that the relators have filed with the Supreme Court of the United States an application for a request that that court act to accomplish the same purposes to be accomplished by their request to us to exercise our original jurisdiction.

"The existence of the two concurrent applications could put this court in the position of exercising parallel juris-

diction with the Supreme Court of the United States. We deem this inadvisable. Accordingly, the matter is continued until the Supreme Court of the United States has made known whether or not it will accept jurisdiction in the matter."

On November 13, 1975, the interveners caused to be filed in this court the bill of exceptions in No. 40445.

On November 13, 1975, Mr. Justice Blackmun, acting upon the application for stay directed to him, rendered an opinion in part as follows: "It is highly desirable, of course, that the issue, concerning, as it does, an order by a Nebraska state court, should be decided in the first instance by the Supreme Court of Nebraska, and that the pendency of the application before me should not be deemed to stultify that court in the performance of its appropriate constitutional duty. The application, after all, was submitted to me on the assumption that action by the Nebraska court would not be forthcoming until after a submission to be scheduled no earlier than December 1 and on the further assumption that the District Court's order satisfied the requirements of 28 U.S.C. § 1257. On the expectation, which I think is now clear and appropriate for me to have, that the Supreme Court of Nebraska, forthwith and without delay, will entertain the petitioners' application made to it, and will promptly decide it in the full consciousness that 'time is of the essence,' I hereby give the Supreme Court of Nebraska that assurance it desired that, at least for the immediate present, I neither issue nor finally deny a stay on the papers before me."

The assumption referred to in the quoted portion of the opinion of Mr. Justice Blackmun that action by this court would not be forthcoming until December 1, 1975, is erroneous and apparently is based upon a misunderstanding on

the part of the relators and interveners' counsel. Only the motion to advance the appeal in No. 40445 is subject to Rule 12 b, Revised Rules of the Supreme Court of the State of Nebraska, 1974, pertaining to hearing "on the first day of a regular session," and that rule contains provisions for exceptions "under special circumstances."

Action upon application for leave to file an original action is not subject to Rule 12 b and it has been the uniform practice of this court to act upon such applications upon due consideration and following a report made by one of the members of this court to the entire court. This report was in process of preparation when the application of the relators was filed in the Supreme Court of the United States as above mentioned. Rule 2 a 2, Revised Rules of the Supreme Court of the State of Nebraska, 1974, provides for oral argument on applications only when ordered by this court.

The nature of the issues in this case indicate that oral argument is advisable. Procedural due process requires that we not act summarily upon an order of stay as the relator seemingly desires, but that all of the interested parties, to wit, Erwin Charles Simants, defendant in No. 40445; the State of Nebraska; and the Honorable Hugh Stuart, respondent in the proposed original action, be given an opportunity to be heard along with the relators.

The court finds that the application of the relators to commence an original action in this court should be granted.

The court further finds that the motion of Nebraska Press Association, the Omaha World Herald Company, the Journal Star Printing Company, the West Publishing Company, North Platte Broadcasting Company, Nebraska Broadcasting Association, Associated Press, United Press International, and Sigma Delta Chi, hereinafter referred to as

petitioners for an order staying the enforcement of the order of the District Court of Lincoln County, Nebraska, dated October 27, 1975, relating to pre-trial publicity, should be heard and considered at the same time as the application of the relators in State ex rel. Nebraska Press Association et al. v. The Honorable Hugh Stuart, for a stay order.

It is therefore ordered that the application of the relators for leave to file an original action in this court is sustained and the clerk is directed to file the petition tendered by the relators.

It is further ordered that the application of the relators for an order staying the enforcement of the order of the District Court of Lincoln County, Nebraska, in State of Nebraska v. Erwin Charles Simants, dated October 27, 1975, relating to pre-trial publicity in that case, is set for hearing before this court at 10 a.m., on Tuesday, November 25, 1975.

It is further ordered that the motion of the petitioners in the original action for an order staying the enforcement of the order of the District Court of Lincoln County, Nebraska, dated October 27, 1975, relating to pre-trial publicity is also set for hearing at 10 a.m., on Tuesday, November 25, 1975.

It is further ordered that a copy of this order be served forthwith upon the counsel for the relators, the respondent, the Attorney General of the State of Nebraska, the County Attorney of Lincoln County, Nebraska, and the Public Defender of Lincoln County, Nebraska.

It is further ordered that counsel and each of them are invited and directed to appear before this court at 10 a.m. on Tuesday, November 25, 1975, and present argument as to whether the application of the relators for a stay order should be granted. Counsel may also present argument as

Order for Hearing and Order to Show Cause

to whether this court has jurisdiction to grant any of the relief requested by relators. We request that particular attention be directed to the question of whether the order of October 27, 1975, is either absolutely void or erroneous.

Counsel are invited to present argument as to whether the petitioners have standing in case No. 40445 to request an order to stay the enforcement of the order of the District Court relating to pre-trial publicity.

Leave to file type-written briefs on or before 10 a.m., November 25, 1975, is granted.

On Reapplication for Stay

SUPREME COURT
OF THE UNITED STATES

No. A-426

[November 20, 1975]

NEBRASKA PRESS ASSOCIATION et al.,

Applicants,

v.

HUGH STUART, Judge, District Court of Lincoln County, Nebraska

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MR. JUSTICE BLACKMUN, Circuit Justice.

An application for stay of the order dated October 27, 1975, of the District Court of Lincoln County, Neb., resulted in my issuance of a chambers opinion, as Circuit Justice, on November 13. In that opinion I indicated that the issue raised is one that centers upon cherished First and Fourteenth Amendment values; that the challenged state court order obviously imposes significant prior restraints on media reporting; that it therefore came to me "'bearing a heavy presumption against its constitutional validity,'" *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971); that if no action on the application to the Supreme Court of Nebraska could be anticipated before December 1, there would be a delay "for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the applicants possess and may properly

assert"; that, however, it was highly desirable that the issue should be decided in the first instance by the Supreme Court of Nebraska; and that "the pendency of the application before me should not be deemed to stultify that court in the performance of its appropriate constitutional duty." I stated my expectation that the Supreme Court of Nebraska will entertain, "forthwith and without delay," the application pending before it, "and will promptly decide it in the full consciousness that 'time is of the essence'." I refrained from either issuing or finally denying a stay on the papers before me. That, however, was without prejudice to the applicants to reapply to me should prompt action not be forthcoming. The applicants have now renewed their application for a stay.

One full week has elapsed since my chambers opinion was filed. No action has been taken by the Supreme Court of Nebraska during that week. The clerk of that court has stated, however, that the applicants have been allowed to docket their original application by way of mandamus to stay the order of the District Court of Lincoln County, and that the matter is set for hearing before the Supreme Court of Nebraska on November 25.

Whether the Nebraska court will reach a definitive decision on November 25, or very shortly thereafter, I do not know. Obviously at least 12 days will have elapsed, without action, since the filing of my chambers opinion, and more than 4 weeks since the entry of the District Court's restrictive order. I have concluded that this exceeds tolerable limits. Accordingly, subject to further order of this Court, and subject to such refinement action as the Supreme Court of Nebraska may ultimately take on the application pending before it, I issue a partial stay.

A question is initially raised as to my power and jurisdiction to grant a stay. As a single Justice, I clearly have the authority to grant a stay of a state court's "final judgment or decree" that is subject to review by this Court on writ of certiorari. 28 U.S.C. §§ 2101(f) and 1257(3). Respondents to the application for a stay have objected that there is no such "final judgment or decree" upon which I may act. The issue is not without difficulty, for the Supreme Court of Nebraska gives promise of reviewing the District Court's decision, and in that sense the lower court's judgment is not one of the State's highest court, nor is its decision the final one in the matter. Where, however, a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable. By deferring action until November 25, and possibly later, the Supreme Court of Nebraska has decided, and, so far as the intervening days are concerned, has finally decided, that this restraint on the media will persist. In this sense, delay itself is a final decision. I need not now hold that in any area outside that of prior restraint on the press, such delay would warrant a stay or even be a violation of federal rights. Yet neither can I accept that this Court, or any individual Justice thereof, is powerless to act upon the failure of a State's highest court to lift what appears to be, at least in part, an unconstitutional restraint of the press. When a reasonable time in which to review the restraint has passed, as here, we may properly regard the state court as having finally decided that the restraint should remain in effect during the period of delay. I there-

fore conclude that I have jurisdiction to act upon that state court decision.

I shall not repeat the facts of the case. They were set forth in my chambers opinion of November 13. Neither shall I pause again to elaborate on this Court's acute sensitivity to the vital and conflicting interests that are at stake here. There is no easy accommodation of those interests, and it certainly is not a task that one prefers to take up without the benefit of the participation of all members of the Court. Still, the likelihood of irreparable injury to First Amendment interests requires me to act. When such irreparable injury is threatened, and it appears that there is a significant possibility that this Court would grant plenary review and reverse, at least in part, the lower court's decision, a stay may issue. *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974). Taking this approach to the facts before me, I grant the requested stay to the following extent:

1. The most troublesome aspect of the District Court's restrictive order is its wholesale incorporation of the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation. Without rehearsing the description of those guidelines set forth in my prior opinion, it is evident that they comprise a "voluntary code" which was not intended to be mandatory. Indeed, the word "guidelines" itself so indicates. They are merely suggestive and, accordingly, are necessarily vague. To cite only one example, they state that the publication of an accused's criminal record "should be considered very carefully" and "should generally be avoided." These phrases do not provide the substance of a permissible court order in the First Amendment area. If a member of the press is to go to jail for reporting

news in violation of a court order, it is essential that he disobey a more definite and precise command than one that he consider his act "very carefully." Other parts of the incorporated Guidelines are less vague and indefinite I find them on the whole, however, sufficiently riddled with vague and indefinite admonitions — understandably so in view of the basic nature of "guidelines" — that I have concluded that the best and momentary course is to stay their mandatory and wholesale imposition in the present context. The state courts, nonetheless, are free forthwith to reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of this order. That portion of the restrictive order that generally incorporates the Guidelines is hereby stayed.

2. No persuasive justification has been advanced for those parts of the restrictive order that prohibit the reporting of the details of the crimes, of the identities of the victims, or of the testimony of the pathologist at the preliminary hearing that was open to the public. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 487-497 (1975). These facts in themselves do not implicate a particular putative defendant. To be sure, the publication of the facts may disturb the community in which the crimes took place and in which the accused, presumably, is to be tried. And their public knowledge may serve to strengthen the resolve of citizens, when so informed, who will be the accused's prospective jurors, that someone should be convicted for the offenses. But until the bare facts concerning the crimes are related to a particular accused, it does not seem to me that their being reported in the media irreparably infringes

the accused's right to a fair trial of the issue as to whether he was the one who committed the crimes. There is no necessary implication of the person, who has been named as the accused, in the facts suppressed by paragraphs 4 and 5 of the District Court's restrictive order, and to that extent the order is hereby stayed.

3. At the same time I cannot, and do not, at least on an application for a stay and at this distance, impose a prohibition upon the Nebraska courts from placing any restrictions at all upon what the media may report prior to trial. Restraints of this kind are not necessarily and in all cases invalid. See *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972); *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S., at 1307; *Newspapers, Inc.* v. *Blackwell*, 421 U.S. 997 (1975). I am particularly conscious of the fact that the District Court's order applies only to the period prior to the impaneling, and presumably the sequestration, of a jury at the forthcoming trial. Most of our cases protecting the press from restrictions on what they may report concern the trial phase of the criminal prosecution, a time when the jurors and witnesses can be otherwise shielded from prejudicial publicity, and also a time when both sides are being heard. See, e.g., *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941). Restrictions limited to pretrial publicity may delay media coverage—and, as I have said, delay itself may be impermissible—but at least they do no more than that.

I therefore conclude that certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial. A confession or statement against interest is the paradigm. See *Rideau* v. *Louisiana*,

373 U.S. 723 (1963); *Irvin* v. *Dowd*, 366 U.S. 717 (1961). A prospective juror who has read or heard of the confession in statements repeatedly in the news may well be unable to form an independent judgment as to guilt or innocence from the evidence adduced at trial. In the present case, there may be other facts that are strongly implicative of the accused, as, for example, those associated with the circumstances of his arrest. There also may be facts that are not necessarily implicative, but that are highly prejudicial, as, for example, facts associated with the accused's criminal record, if he has one. Certain statements as to the accused's guilt by those associated with the prosecution might also be prejudicial. There is no litmus paper test available. Yet some accommodation of the conflicting interests must be reached. The governing principle is that the press, in general, is to be free and unrestrained and that the facts are presumed to be in the public domain. The accused, and the prosecution if it joins him, bears the burden of showing that publicizing particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt. Of course, if a change of venue will not allow the selection of a jury that will have been beyond the reach of the expected publicity, that also is a factor.

4. Paragraph 6 of the restrictive order also prohibits disclosure of the "exact nature of the limitations" that it imposes on publicity. Since some of those limitations are hereby stayed, the restrictions on the reporting of those limitations are stayed to the same extent. Inasmuch as there is no point in prohibiting the reporting of a confession if it may be reported that one has been made but may not be spoken of, the provision in paragraph 6 that the re-

striction on reporting confessions may itself not be disclosed is not stayed.

5. To the extent, if any, that the District Court's order prohibits the reporting of the pending application to the Supreme Court of Nebraska, and to the extent, if any, that the order prohibits the reporting of the facts of the filing of my chambers opinion of November 13, or of this opinion (other than those parts of the opinions that include facts properly suppressed), the restrictive order is also stayed.

6. Nothing herein affects those portions of the restrictive order governing the taking of photographs and other media activity in the Lincoln County courthouse. Neither is it to be deemed as barring what the district judge may impose by way of restriction on what the parties and officers of the court may say to any representative of the media.

The District Court and the Supreme Court of Nebraska obviously are closer than I am to the facts of the crimes, to the pressures that attend it, and to the consequences of community opinion that have arisen since the commission of the offenses. The Supreme Court, accordingly, is in a better position to evaluate the details of the restrictive order. It may well conclude that other portions of that order are also to be stayed or vacated. I have touched only upon what appear to me to be the most obvious features that require resolution immediately and without one moment's further delay.

Dated November 20, 1975

HARRY A. BLACKMUN
Associate Justice
United States Supreme Court

A true copy MICHAEL RODAK, JR.

Test:

Clerk of the Supreme Court of the United States
By FRANCIS J. CORSON

Deputy

Per Curiam Opinion

[December 1, 1975]

No. 40471

STATE OF NEBRASKA ex rel.
NEBRASKA PRESS ASSOCIATION, et al.,

Relators,

v.

THE HONORABLE HUGH STUART, Judge, District Court of Lincoln County, Nebraska,

Respondent.

No. 40445

STATE OF NEBRASKA,

Plaintiff,

v.

ERWIN CHARLES SIMANTS,

Defendant.

Heard before:

WHITE, C.J.,
SPENCER, BOSLAUGH, McCOWN, NEWTON, CLINTON, and BRODKEY, JJ.

PER CURIAM.

At issue in these cases is the resolution of an apparent conflict between the guarantees of the First and Sixth Amendments to the Constitution of the United States. This court is called upon to draw an accommodation between these two "preferred" amendments which will preserve the right to a fair trial without abridging freedom of the press.

Per Curiam Opinion

The issue is laid before us by the relators in No. 40471, television, newspaper, and other media organizations and personnel, who seek through an original action a writ of mandamus which will compel the respondent District Court Judge for Lincoln County to vacate a restrictive order relating to the publication of pretrial publicity in the case of Nebraska v. Erwin Charles Simants, No. 40445.

On October 18, 1975, six members of a family were found dead of gunshot wounds in their home at Sutherland, Nebraska. On October 19, 1975, Erwin Simants was charged with six counts of murder in the first degree, arraigned, and counsel was appointed for him. A preliminary hearing was set for October 22, 1975. On October 21, 1975, the prosecuting attorney filed a motion for a restrictive order with the county court, requesting the court to restrict publication of testimony to be presented at the preliminary hearing. A hearing on the motion was held that same evening. Attorneys representing the State, Simants, and the media were present. Attorney for the defendant advised the court that Simants consented to the State's motion to restrict publication of testimony from the preliminary hearing and further made an oral motion requesting that the restrictive order be broadened to close the preliminary hearing to the public and press. After arguments by counsel, the court found the State's motion should be sustained.

On October 22, 1975, prior to the preliminary hearing, the county court entered a restrictive order. The order precluded all parties involved in the preliminary hearing as well as the "news media" from releasing "for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary

hearing. The order also contained additional restrictive provisions apart from the preliminary hearing. Finally, the court denied Simants' motion requesting a closed hearing.

On October 22, 1975, the preliminary hearing was held on an amended complaint which charged murder in the first degree and further alleged that one or more of the murders were committed in the perpetration of or attempt to perpetrate one or more sexual assaults. After testimony from several witnesses and the introduction of other evidence, Simants was bound over to District Court to stand trial.

On October 23, 1975, attorneys representing the persons who are now the relators in the mandamus action filed in the case of State v. Simants in the District Court an application requesting the right to be heard on a challenge to the constitutionality of the restrictive order entered by the county court. The District Court granted petitioners' motion to intervene. On that same day, October 23, 1975, Simants made a motion for a continuation of the county court's restrictive order with respect to pretrial publicity. On October 27, 1975, the District Court acted on defendant's motion. It terminated the county court's order and imposed its own restrictions on dissemination of pretrial publicity emanating from the case. The District Court adopted, with some clarifications, the standards set out in The Nebraska Bar-Press Guidelines for Disclosing and Reporting of Information Relating to Imminent or Pending Criminal Litigation. These standards, together with the accompanying clarifications, precluded the media from reporting on most of the testimony and some other evidence presented at the preliminary hearing.

Petitioners sought relief in this court from the October 27, 1975, restrictive order imposed by the District Court via two procedural routes. On October 31, 1975, petitioners instituted a section 29-1912, R.R.S. 1943, appeal from the District Court order and at the same time petitioned this court for leave to file an original action in the nature of a writ of mandamus requesting this court to vacate the October 27, 1975, restrictive order.

While petitioners' appeal and request to docket an original action in this court were pending, they petitioned Mr. Justice Blackmun of the United States Supreme Court, asking him as Circuit Justice to stay the October 27, 1975, District Court order under 28 U.S.C., sections 2101(f) and 1257(3). Thereafter, this court on November 10, 1975, issues a per curiam memorandum in which we noted that petitioners were seeking concurrent relief from both the United States Supreme Court and this court and we therefore declined to take action on the petition for a writ of mandamus so long as we were in the position of exercising parallel jurisdiction with the Supreme Court of the United States. We continued action on the matter until the United States Supreme Court made known whether it would accept jurisdiction in the matter.

On November 13, 1975, Mr. Justice Blackmun, in his capacity as Circuit Justice, issued a chambers opinion in which he noted his desire to restrain from issuing or denying a stay on the restrictive order until this court had an opportunity to act on the same.

On November 18, 1975, this court set November 25, 1975, as the date on which we would hear petitioners' arguments on their request for an original action as well as on the

substantive questions surrounding the constitutionality of the restrictive order. Petitioners thereafter filed a reapplication for a stay with Mr. Justice Blackmun.

On November 20, 1975, Mr. Justice Blackmun handed down a chambers opinion in which he granted petitioners a partial stay on the October 27, 1975, order. The extent of that stay will be discussed in greater detail below.

On November 24, 1975, the Lincoln County attorney and defendant's attorney filed petitions in intervention with this court requesting to be heard at the November 25, 1975, hearing. The petitions were granted and a full hearing was held before this court on that date.

On November 25, 1975, this court, despite the intervening order of Mr. Justice Blackmun heard oral arguments in both cases before us insofar as they pertain to the request for a stay of the restrictive order of the District Court. After Mr. Justice Blackmun issued his order the media not being satisfied therewith invoked the jurisdiction of the Supreme Court of the United States and asked it to vacate the portion of the trial court's restrictive order not vacated by Mr. Justice Blackmun. If we were to be entirely consistent we ought now to again refrain from acting because we are now in the position of exercising concurrent jurisdiction with the United States Supreme Court for which there is no precedent. Nonetheless, despite the regretable possibility of collision, there are important questions of procedure and standing which need definition by us and which relate only to state procedures. In addition, the trial courts of this state are in need of some guidance from us in the matter at issue and which may not be otherwise forthcoming. Additionally, as Mr. Justice Blackmun appropriately notes, the question of the jurisdiction of the Supreme

Court of the United States in this matter is "not without difficulty" because there has been no order, final or otherwise, by this court. That "difficulty" ought to be removed. So we proceed to determine the matter before us on the merits insofar as the request for the stay of the lower court order is concerned.

The first question we must decide is of that of our own jurisdiction in No. 40471, the original action of mandamus. We have jurisdiction in an original action of mandamus if the order of Judge Stuart of October 27, 1975, is in whole or in some significant part wholly void. State ex rel. Reynolds v. Graves, 66 Neb. 17. We conclude, for reasons hereinafter stated, that the order is in part void and so affirm or grant a permission to the relators to file the original action.

The next question before us is whether the relators had standing to intervene in the case of State v. Simants, No. 40445. No third party has any right to intervene in a criminal prosecution. The matter at issue in such cases is the guilt or innocence of the accused. In legal contemplation no third party "has or can claim an interest in the matter in litigation, in the success of either of the parties to [the] action, or against both." This is the standard applicable to the right to intervene. § 25-328, R.R.S. 1943. See State v. Berry, 192 Neb. 826. Accordingly, the appeal in No. 40445 is dismissed.

The restrictive order of Judge Stuart of October 27, 1975, insofar as we need to set it forth is in summary as follows: It applies only to pretrial publicity and terminates when the jury is empaneled to try the case of State v. Simants. It applies only to the relators. It incorporates generally as a standard for reporting certain voluntary Nebraska Bar-Press Guidelines for Disclosing and Report-

ing of Information Relating to Imminent or Pending Criminal Litigation. It prohibits the publication of the fact, if any, or the contents of confessions or admissions against interest or statements, made by the accused to law enforcement officials. It prohibits the publication of the fact, if any, or the contents of statements against interests made to certain named individuals. It prohibits the publication of the nature of the probable testimony of certain named witnesses, and certain aspects of the testimony of another named witness. It prohibits the publication of the identity of a person or persons allegedly sexually assaulted. It prohibits the publication of the exact nature of the limiting order and prohibits reference to the contents of two specific paragraphs of the order.

We now proceed to our resolution and accommodation of the two conflicting constitutional rights and introduce that resolution by quotations from a statement on matters of joint concern to the bench, the bar, law enforcement officers, and the news media contained in the Standards Relating to Criminal Justice, A.B.A. "(a) *General.* Freedom of speech and of the press are fundamental liberties guaranteed by the United States Constitution. They must be zealously preserved, but at the same time must be exercised with an awareness of the potential impact of public statements on other fundamental rights, including the right of a person accused of crime, and of his accusers, to a fair trial by an impartial jury.

"(b) *The need to inform the public.* It is important both to the community and to the criminal process that the public be informed of the commission of crime, that corruption and misconduct, including the improper failure to arraign or to prosecute, be exposed whenever they are found, and

that those accused of crime be apprehended. If, however, public statements and reporting with respect to these matters assume the truth of what may be only a belief or a suspicion, they may destroy the reputation of one who is innocent and may seriously endanger the right to a fair trial in the event that formal charges are filed.

"(c) *From the time of arrest or the filing of charges to the beginning of trial.* A man who has been arrested, for whom an arrest warrant has been issued, or against whom a criminal complaint, information, or indictment has been filed, has only been charged with the commission of crime. He is entitled under the Constitution to a fair and impartial trial, in which he is presumed innocent until proved guilty by competent evidence. Thus during the period prior to trial, public statements originating from officials, attorneys, or the news media that assume the guilt of the person charged, that include inaccurate or inadmissible information, or that serve to inflame the community, may undermine the judicial process by making unobtainable a jury satisfying the requisite standard of impartiality. Alleged facts may be untrue, confessions obtained or evidence seized may be inadmissible in evidence, prior criminal records will be inadmissible except under limited circumstances and for restricted purposes, and witnesses may substantially modify their stories under oath or after confrontation by the accused on cross-examination. The right to a fair trial may thus be substantially endangered by public statements or by reporting prior to trial going beyond a factual description of the person arrested and of the crime charged and a factual statement of the arrest and surrounding circumstances. The danger is especially acute when public statements or reporting extend to such

matters as confessions or admissions, prior history, or the performing of tests or refusal to submit to a test; opinions about guilt or innocence; interviews of prospective witnesses; interviews of the defendant before he has had an opportunity to consult with counsel; and speculation as to the plea to be entered or the evidence or testimony to be introduced at the trial. The release and publication of photographs when identification is a matter in dispute may cause particular difficulty, as may reiteration of any earlier detailed reports as the time of trial approaches."

The constitutional guarantees of freedom of speech and of the press and of the right of trial by an impartial jury are, in our judgment, the same under both the Constitution of this state and of the United States and there is no need to differentiate between the two Constitutions in this discussion.

"The First Amendment freedoms are not ends in themselves, but only means to the end of a free society. . . . The First Amendment freedoms are vital, but their exercise must be compatible with the preservation of other essential rights. Application of the First Amendment can no more be governed by absolute rules than can that of other constitutional provisions." Schwartz, Constitutional Law, p. 251. The rights which are guaranteed by the First Amendment to the United States Constitution and the right to trial by an impartial jury guaranteed by the Sixth Amendment are both "preferred" rights. Schwartz, *op sit*, p. 193. The Constitution makes no hierachy of rights. Jackson, J., dissenting, Brinegar v. United States, 337 U.S. 610, 180 (1949).

The Supreme Court of the United States has not yet had occasion to speak definitively where a clash between these two preferred rights was sought to be accommodated by

a prior restraint on freedom of the press. There are, however, some statements in various opinions which lead to the conclusion that under some circumstances prior restraint may be appropriate. In Branzburg v. Hayes, 408 U.S. 665 (1972) where the claimed right of a newsman not to be compelled to testify before a grand jury was denied, Mr. Justice White, in the majority opinion said: "The prevailing view is that the press is not free with impunity to publish everything and anything it desires to publish. . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. In Sheppard v. Maxwell, 384 U.S. 333 (1966), for example, the Court reversed a state court conviction where the trial court failed to adopt 'stricter rules governing the use of the courtroom by newsmen as Sheppard's counsel requested,' neglected to insulate witnesses from the press, and made no 'effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides.' Id., at 358, 359. '[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters.' *Id.*, at 361." The statement immediately preceding the citation of Sheppard v. Maxwell is, however, dicta as no issue of prior restraint was actually involved in the Sheppard case. There are implications in some opinions that prior

restraints may be imposed and it is also clear that the Supreme Court of the United States has never said, in the context with which we are here concerned, that such restraints may never be imposed when necessary to assure trial by an impartial jury. See Irvin v. Dowd, 366 U.S. 717; Frankfurter, J., concurring, p. 729. In Pennecamp v. United States, 328 U.S. 331, Mr. Justice Reed said: "Free discussion of the problems of society is a cardinal principle of Americanism — a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct. It does not follow that public comment of every character upon *pending trials* or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to the fair and orderly judicial administration. Courts must have the power to protect the interests of prisoners and litigants before them from unseemly efforts to prevent judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." (Emphasis supplied.) In New York Times v. United States, 403 U.S. 713, it is said in a case not involving personal conflicting constitutional rights that a prior restraint on the media bears "a heavy presumption against its constitutional validity." This same statement has been made

by the Supreme Court of the United States in other cases. The implication of such statement is that if there is only a presumption of unconstitutionality then there must be some circumstances under which prior restraints may be constitutional for otherwise there is no need for a mere presumption.

None of the cases in which the United States Supreme Court has used language which imports an absolutist view of the First Amendment free speech right involves a conflict between two fundamental or preferred constitutional rights. In Bridges v. State of California, 314 U.S. 252, Justice Black noted the difficulty of resolving conflicts between the rights of free speech and fair trial and said: "[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." (p. 260) In Cox Broadcasting Corp. v. Martin Cohn, 43 L. Ed. 2d 328, the conflict was between freedom of the press and a claimed right of personal privacy which was, under the circumstance, clearly not a constitutional right. See, also, Craig v. Harney, 331 U.S. 367 (misconduct); Near v. Minnesota, 283 U.S. 697 (misconduct).

It is, of course, absolutely clear that the purpose of freedom of the press is not to determine the outcome of litigation by newspaper publicity, although unfortunately on some occasions it has been so used. Sheppard v. Maxwell, *supra;* State v. Lovell, 117 Neb. 710; Irvin v. Dowd, *supra;* Rideau v. Louisiana, 373 U.S. 723.

The relators take an absolutist position as far as freedom of the press is concerned and state that even if in some cases because of the exercise of freedom of the press pretrial publicity was such that trial by an impartial jury became impossible it is better that an accused go free than

that freedom of the press be impinged even in the slightest degree. They say, "Petitioners would initially point out that the irreparable injury in such a situation is not that defendant will be incarcerated on the basis of an unfair trial; *the injury . . . is to society as a whole, which, due to the impossibility of a defendants obtaining a fair trial, must necessarily forego a conviction of a person who may well have committed the crime for which he is charged.*" (Emphasis supplied.)

In the preface of its restrictive order the District Court found "there is a clear and present danger that pretrial publicity would impinge upon the defendant's right" to be tried by an impartial jury, that is, as we see it, by 12 persons who have not already made up their minds as to the defendant's guilt or innocence. It is, of course, the constitutional right of a defendant to rely upon the presumption of innocence which the law gives and to require the State to prove that he (1) committed the act charged and (2) his legal culpability, if that is also an issue.

We have earlier referred to the principle that orders imposing prior restraint bear a heavy presumption of unconstitutionality. Does the evidence in the court below support the court's finding so as to overcome the heavy presumption of unconstitutionality of the prior restraint? The trial court in the preface to its restrictive order found that there is a clear and present danger that pretrial publicity could substantially impair the right of the defendant to a trial by an impartial jury unless restraints were imposed. Does that evidence rather clearly indicate that the obligation of this state under the Constitutions of the United States and of this state to afford the accused a trial by an impartial jury may be impaired by pretrial publicity? The relators argue that there is no

evidence to support the finding because there was no hearing at which they were represented and because no evidence was actually received by the county court at its hearing. Both assertions are true, but it is not the order of the county court which is under attack here.

We are confronted with two separate questions. The first is the question of the jurisdiction of the court over the persons of the relators. The second is the sufficiency of the evidence to support the necessity of an order imposing some prior restraints, assuming that prior restraint in any degree is constitutional. We first deal with the question of jurisdiction.

The relators, by their motion to intervene in State v. Simants invoked and submitted themselves to the jurisdiction of the District Court. Their motion was granted (erroneously, as we have previously indicated), nonetheless, at that time the District Court acquired jurisdiction over the persons of the relators. They were heard and evidence was received. The District Court then temporarily adopted as its own the previous order of the county court and later adopted its own modified order. It is that order that is before us for examination. Relators point out, quite properly we believe, that "a judgment entered without jurisdiction of the person or the subject matter or in excess of the court's power is void and may be collaterally impeached." Woods v. Goodson, 485 S.W. 2d 213. It seems clear enough that the county court had no jurisdiction over the persons of the relators. The order of the county court was void for lack of jurisdiction of the person. That order purports to restrain "the news media." The courts have no general power in any kind of case to enjoin or restrain "everybody". Even when acting with jurisdiction in proper cases orders must pertain to par-

ticular persons or legal entities over whom the court has in some manner acquired jurisdiction.

The relators could have ignored the order, or, if they wished to avoid the possibility of some effort by the court to start contempt proceedings, collaterally attacked the order in some manner as by mandamus or action for a declaratory judgment. Admittedly these latter courses would have been somewhat time consuming. Perhaps for that reason the relators sought to intervene directly in State v. Simants, which they did in the District Court. Their request was granted by the court. Their appearance was not special, but general. These relators voluntarily submitted to the jurisdiction of the court and asked not only that the order be lifted, but also opposed the request of the defendant that certain pretrial proceedings be closed to the general public.

We now turn to the circumstances under which the District Court entered its restrictive order. The evidence in the hearing before the District Judge consisted principally of the testimony of the county judge who had entered the prior order and copies of numerous news articles from newspapers printed or circulated in the county where the crime occurred. The record demonstrates clearly that even before the defendant was afforded a preliminary hearing which the statutes of this state, namely section 29-1607, R.S. Supp., 1974, and probably the Constitution of the United States, requires (see Gerstein v. Pugh, 420 U.S. 103), certain of the newspapers had printed articles which contained hearing information, of purported statements of the counsel, which, if true, tended clearly to connect the accused with the slayings and which information, if true, was likely to be, or at least some of it, presented at the preliminary hearing. The items to which we refer

were printed within articles of the October 20, 1975, issue of the North Platte Telegraph; the October 20, 1975, issue of the Lincoln Star; the October 21, 1975, issue of the Denver Post. This information, if obtained from official sources, would not under the provisions of item 1 of the guidelines under the heading "Information Generally Not Appropriate for Disclosure and Reporting" be appropriate for reporting. The record shows that this was recognized by some of the media, but doubt was expressed that the voluntary guidelines would apply to a preliminary hearing. The District Court, therefore, could quite properly conclude that their evidence from the preliminary hearing, if it was in fact presented would have again been repeated by at least some of the relators. Those conclusions are reinforced by the fact that in open court at the hearing before the District Judge, counsel for the media stated that it is already doubtful that an unbiased jury can be found to hear the Simants case in Lincoln County. This statement of counsel was later reported in the October 23, 1975, issue of the North Platte Telegraph.

The concern of the prosecutor, the defense attorney, and the county judge that pretrial publicity might make it difficult or impossible for the State of Nebraska to afford Simants a trial before an impartial jury was not ill founded. Unless the absolutist position of the relators was constitutionally correct, it would appear that the District Court acted properly in restraining publication of certain information which might or may have been adduced at the preliminary hearing.

Section 29-1301, R.S.Supp., 1975, provides: "All criminal cases shall be tried in the county where the offense was committed, except as otherwise provided in sections 29-1301.01 to 29-1301.03 or section 240903, or unless it shall

appear to the court by affidavits that a fair and impartial trial cannot be had therein. In such a case the court may direct the person accused to be tried in some adjoining county." The laws of this state also provide that an accused must be tried witin 6 months within the date of the filing of the information or be absolutely discharged. § 29-3205, et seq., R.R.S. 1943; State v. Alvarez, 189 Neb. 281. Trial of the accused has now been set for January 5, 1976.

There are other factors which the District Court could properly take into consideration. The population of Lincoln County, Nebraska, according to the 1970 census was 29,538. The populations, according to the same census of the adjacent counties to which venue might be changed are as follows:

County	*1970 Population*
Keith	8,487
Perkins	3,423
Hayes	1,530
Frontier	3,982
Dawson	19,537
Custer	14,092
Logan	991
McPherson	623

The area in which the jury may be selected is served by several radio stations, two television stations, and several newspapers in addition to those specifically mentioned. Modern communications tend toward the saturation point in news coverage and so as a practical matter in some cases it is much more difficult to obtain an impartial jury than it once was. This is evidenced by the reported cases,

Sheppard v. Maxwell, *supra;* Irvin v. Dowd, *supra;* Rideau v. Louisiana, *supra.* The mere heinousness or enormity of a crime is, of course, by itself, no reason at all for a prior restraint of freedom of the press, but certainly it is a matter which a court may take into consideration along with all the other factors involved. One of these factors is, of course, the trial court's own knownledge of the surrounding circumstances.

We now turn to a discussion of the merits of the basic issue. That the press be absolutely free to report corruption and wrongdoing, actual or apparent, or incompetence of public officials of whatever branch of government is vastly important to the future of our state and nation cannot be denied as anyone who is familiar with recent events must be well aware. Prior restraint of the press, however slight, in such instances is unthinkable. Near v. Minnesota, *supra.* In these instances and many others no preferred constitutional rights collide.

In cases where equally important constitutional rights may collide then it would seem that under some circumstances, rare though they will be, that an accommodation of some sort must be reached. It is difficult to accept the relators' position that press in such cases must be completely unrestrained even if the cost is that a criminal cannot be tried. It is also difficult to accept the proposition that an accused may not be irreparably harmed by wrongful incarceration. Sheppard v. Maxwell, *supra,* is a case in point. Defendant's guilt was doubtful. Defendant's conviction was accomplished, as the opinion of the Supreme Court of the United States indicates, almost wholly because of a concededly outrageous exercise of freedom of the press. The defendant served 10 years of his sentence until his conviction was overturned and a new trial granted

The subsequent finding of not guilty can scarcely be said to have made the injuries suffered by the incarceration reparable. This comment, of course, is not to suggest that the reporting in this case was or is even likely to be anything like that referred to in Sheppard v. Maxwell, *supra*. The press, in fact, appears to have followed the voluntary guidelines to which they apparently were parties.

It is not, however, the accused alone who has a large stake in the constitutional right of trial by an "impartial jury." Society as a whole has just as great a stake. This is true not only because each member of the public might some day need to exercise his own right of trial by jury, but because the United States and each state of the union have the obligation under the Constitution to assure every accused of a trial by an impartial jury.

The extremist and absolutist position of the relators assumes too much. Society as a whole loses a great deal when a criminal has to go free because he cannot be tried. The same thing is true in the case where an innocent person may be convicted because an impartial jury cannot be obtained. In such cases the true criminal has gone free.

In cases where such things as this are likely to occur the constitutional right of a free press comes into direct conflict with the obligation of the state under the United States and state Constitutions to assure an accused of a trial by an impartial jury. First Amendment rights other than freedom of the press and of speech are not absolute. Freedom of religion is one of the First Amendment rights. Yet religious belief cannot be pleaded as justification for criminal action. Davis v. Beason, 133 U.S. 333. The constitutional guarantee does not permit the practice of polygamy on the basis of religious belief. Reynolds v. United States, 98 U.S. 145.

The absolutist position assumes that each and every exercise of freedom of the press is equally important and significant and that any impingement whatever may be equally disastrous for our state and nation. Such a position cannot, we believe, be demonstrated. Near v. Minnesota, *supra;* and Sheppard v. Maxwell, *supra*, are examples of the wide disparity of importance. The absolutist position assumes there can be no degree of values for the particular right in which the absolutist has a special interest. It assumes that all other constitutional rights are somehow inferior and that impingement upon his right will ultimately lead to tyranny. The fact that our awareness of recent political history makes us extremely conscious of our great debt to a free press ought not to lead us to disparage other equally cherished personal rights, merely because, in this case, the right, trial by an impartial jury, need not be exercised by all persons. Nor should it lead us to disregard the stake all have in the exercise of that right by those who choose to or must exercise it.

We are cognizant of the possibility that this very court may be called upon in the near future to judge the fairness of the Simants' trial. We ought not to take action here which will in any measure jeopardize that ultimate fairness or put this court in the position of making prejudgments.

We conclude that the order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.

The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the following respects: It shall be effective only as to events which have occurred prior to the release of this opinion, and only as it applies to the relators herein, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interests made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings.

One other aspect of this case requires our attention. Counsel for Simants asked the court below to close to the public, including the press, such of the pretrial proceedings as might be necessary to insure the empaneling of an impartial jury. This request the District Court denied in toto. Relators point out that section 29-311, R.R.S. 1943, provides that all judicial proceedings shall be open. State and Simants respond that the statute, if construed to apply to all pretrial proceedings irrespective of how disclosures during such proceedings might affect Simants' right to be tried by an impartial jury and affect the duty of the State to assure such impartial jury, then it is unconstitutional. We have a duty to construe statutes to make them constitutional if possible. A.B.A. Standard 3.1, Fair Trial and Free Press, in our judgment supplies an applicable standard for such construction. We, therefore, remand No. 40471 to the District Court with directions to consider any applications the State or the accused may make for closed pretrial proceedings in future instances in

accord with the following standard which we adopt. A.B.A. Standard 3.1, Fair Trial and Free Press: "Pretrial hearings.

"Motion to exclude public from all or part of pretrial hearing.

"In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is herefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is not substantial likelihood of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemination of certain information by any means of public communication may jeopardize the right to a fair trial by an impartial jury."

No. 40445. APPEAL DISMISSED.

No. 40471. REMANDED.

Per Curiam Opinion

No. 40471

STATE ex rel. NEBRASKA PRESS ASSOCIATION

v.

THE HONORABLE HUGH STUART

No. 40445

STATE v. SIMANTS,

CLINTON, J., dissenting.

After the issuance of the order of stay by Justice Blackmun as Circuit Judge, and since this matter was set for hearing in this court, the relators, we are reliably informed, have invoked the jurisdiction of the Supreme Court of the United States in an application to that court for full court action to overturn the portion of the order of the District Court for Lincoln County, Nebraska, sustained by the order of Mr. Justice Blackmun.

There is no precedent or authority for this court and the Supreme Court of the United States to exercise concurrent jurisdiction in matters relating to construction of the federal Constitution. Either we have jurisdiction in this case, or the Supreme Court of the United States has jurisdiction.

We have supervisory jurisdiction over the trial courts of this state. State ex rel. Reynolds v. Graves, 66 Neb. 17. We know of no precedent and none has been cited to us which gives to the United States Supreme Court the same supervisory jurisdiction over the trial courts of this state

The jurisdiction of Mr. Justice Blackmun, as Circuit Judge, and the jurisdiction of the Supreme Court of the that it clearly has over the federal courts.

Per Curiam Opinion

United States, as Mr. Justice Blackmun recognizes in his opinion, rest upon the provisions of section 1257(3), 28 U.S.C., under which "Final judgments or decrees rendered by the highest court of a State in which a decision could be had" may be reviewed "where any title, right, privilege or immunity . . . is claimed under the Constitution . . . of the United States." Mr. Justice Blackmun concluded that a final order had been made because our failure to announce a decision exceeded "tolerable limits."

We again point out as we did in the order which set this matter for hearing, that the application of the relators was filed in this court late on Friday, October 31, 1975. As far as the writer of this opinion is aware, the application did not come to the attention of any member of this court until Monday, November 3, 1975, at which time we were engaged in the first of 6 days of oral argument in cases pending before us and already irrevocably scheduled.

This is a collegial court and no member of this court has any constitutional or statutory power to grant a stay of the type here requested. That power must be exercised by the court as a whole. Neither may we act upon the basis of telephone calls from counsel, or telegrams. Where factual matters must be reviewed, we must have before us a bill of exceptions containing the evidence expected to be reviewed.

Although an application to file an original action would not normally be considered until we sat at a regularly scheduled weekly consultation, nonetheless, in this particular case the matter was, in accord with our standing practice, assigned to one of the judges of this court on November 4, 1975, for the purpose of preparing a report and recommendation to be considered by the full court at special consultation on Monday, November 10, 1975.

While that report was in the process of preparation, the relators on November 4 or 5, 1975, had filed with Mr. Justice Blackmun in Washington, D.C., the application for a stay. This intervening and to us unanticipated occurrence affected the content of the report and resulted in the per curiam order of continuance adopted by us on November 10, 1975.

On November 13, 1975, Mr. Justice Blackmun rendered his first opinion on his expectation that we would "act forthwith and without delay." On November 13, 1975, there was filed by the relators the bill of exceptions in No. 40445 and for the first time we had before us something other than ex parte representations as to what had occurred in the trial court. On November 17, 1975, we entered an order permitting the filing of the original action and set for hearing on November 25, 1975, the application for stay both in the original action and the direct appeal and give notice to all parties of the hearing.

Apparently both the relators and Mr. Justice Blackmun expected that we would act summarily without notice to all interested parties and without a hearing. We did not do so, we think for reasons that should be obvious.

Despite the fact that Mr. Justice Blackmun acted on November 20, 1975, we nonetheless held the hearing on November 25, 1975. All parties were heard. However, between November 20, 1975, and November 25, 1975, as we have already mentioned, the relators invoked the jurisdiction of the Supreme Court of the United States to overturn Mr. Justice Blackmun's stay. We believe the relators are estopped to claim that we still have jurisdiction.

Mr. Justice Blackmun indicated that the problem of the jurisdiction of the United States Supreme Court under section 1257, 28 U.S.C., is "not from difficulty." We ought

now to remove that difficulty. The circular state of affairs which has existed ought to come to an end.

The appeal of the relators in No. 40445 should be dismissed on the grounds they have no standing to intervene in a criminal prosecution. § 25-328, R.R.S. 1943; State v. Berry, 192 Neb. 826.

The original action of the relators, No. 40471, ought to be dismissed as improvidently granted because of the intervening jurisdiction in the Supreme Court of the United States.

WHITE, C.J., joins in this dissent.

SPENCER, J., Concurring.

This case requires immediate resolution in this court. While I am in full agreement with the merits of the dissent, I join in the majority opinion to resolve the immediate controversy in this jurisdiction.

Newton, J., joins in this concurrence.

Orders of December 8, 1975

A-426 NEBRASKA PRESS ASSOCIATION et al v. HUGH STUART, JUDGE, DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

On November 21, 1975 the petitioners filed a motion with the full Court to vacate in part Mr. Justice Blackmun's stay order filed herein on November 20, 1975. Inasmuch as the order of November 20 was directed solely to the order dated October 27, 1975 of the District Court of Lincoln County, Nebraska and by its terms was subject to such action as might subsequently be taken by the Supreme Court of Nebraska, and inasmuch as the Supreme Court of Nebraska on December 1 issued its order in the matter and Mr. Justice Blackmun's order has thereby expired and is no longer effective, the petitioners' motion is denied. Denial of this application is without prejudice to the Court's consideration of the petitioners' further application for stays and for other relief filed with this Court on December 4, 1975 and presently pending.

A-513 NEBRASKA PRESS ASSOCIATION et al. v. HUGH STUART, JUDGE, DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

The motion to treat the previously filed papers as a petition for a writ of certiorari to the Supreme Court of Nebraska is granted; consideration of said petition for a writ of certiorari is deferred until requested responses thereto have been received or until the close of business Tuesday, December 9, 1975. Consideration of the application for stay of the judgment of the Supreme Court of Nebraska, entered December 1, 1975, is deferred pending further order of the Court. Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Marshall would grant the application.

Order of December 12, 1975

No. 75-817 NEBRASKA PRESS ASSOCIATION, et al. v. STUART

The motion of Nebraska Press Association, et al., for leave to treat their application as a petition for certiorari having been heretofore granted, it is ordered:

1. The petition for certiorari is granted;

2. The motion to expedite is denied.
   Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall would grant the motion.

3. The application for a stay is denied.
   Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall would grant the application.
   Mr. Justice White would stay the judgment of the Nebraska Supreme Court to the extent that its order forbade the publication of information disclosed in public at the preliminary hearing in the criminal case out of which this case arose. In this respect, he is in disagreement with the Court's actions in this case today. He joins the Court in granting the petition for a writ of certiorari and in ordering plenary consideration of this case, which as he understands it raises issues broader than the power of the State to enjoin the publication of facts disclosed at a public hearing in a state court. Being convinced that these questions should be decided only after adequate briefing and argument and ample time for mature consideration, he is in agreement that we should not attempt to hear and decide this case prior to the beginning of the criminal trial in early January.

4. Petitioners Nebraska Press Association, et al., are invited to file an amended petition for certiorari on or before December 30, 1975. Responses may be made in accord with the Court's Rules.